90-1202

(1)

Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

EVERDEAN MOORE, ETC., ET AL.,

Petitioners,

versus

KELLER INDUSTRIES, INC.,
A Florida Corporation,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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January 4, 1991

QUESTIONS PRESENTED

1. Does either the Equal Protection Clause of the Fourteenth Amendment or the equal protection guarantees of the Fifth Amendment Due Process Clause, prohibit a United States District Court from excusing a Black juror from the venire of a civil action, where the Court is acceding to a peremptory challenge exercised by a party to the proceeding, and where the exercise of that peremptory challenge was motivated by the desire to exclude the potential juror because of his or her race?

2. Does Batson v. Kentucky, 476 U.S. 79 (1986), or the principles underlying that decision, prohibit racial discrimination in the exercise of peremptory challenges in a Federal civil action?

LIST OF PARTIES TO THE PROCEEDING

1. The following persons are Petitioners in this case: Mrs. Everdean Moore, Joseph Moore, Bobbie Amiker, Clinton Amos Moore, Annie Collins, Alma Moore McGowan, Vashti Clayton, Ella Mae Curry, Wilma Branch, Delois Thompson, and Aaron Moore.

2. Keller Industries, Inc., a Florida Corporation, is the Respondent herein.

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IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1990

EVERDEAN MOORE, ETC., ET AL.,
Petitioners,

versus

KELLER INDUSTRIES, INC.,
A Florida Corporation,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Everdean Moore, et al., request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in Moore v. Keller Industries, No. 89-4613 (5th Cir., October 10, 1990).

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit rendered on October 10, 1990, is not reported pursuant to Local Rule 47.5 of the Fifth Circuit. The unpublished opinion is reproduced as Appendix "A" to

this Petition.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Section 1254(1), Petitioners, having asserted below, in the Fifth Circuit Court of Appeals, and continuing to assert in this Court the deprivation of rights secured by the United States Constitution, as delineated in the Petition for Writ of Certiorari.

The judgment and opinion of the Fifth Circuit was rendered on October 10, 1990. Pursuant to Supreme Court Rule 13.1, this Petition is timely filed on or before January 8, 1991.

CONSTITUTIONAL AND STATUTORY PROVISIONS

This case involves the following constitutional provision:

The Fifth Amendment to the United States Constitution, which provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law.

This case also involves 28 U.S.C. Section 1870, which provides in pertinent part:

> In civil cases, each party shall be entitled to three peremptory challenges.

STATEMENT OF THE CASE

Procedural History and Statement of Facts

This civil action was filed on February 26, 1987, by the wife of the late Rev. Amos Moore, Mrs. Everdean Moore, and their children, Joseph Moore, Bobbie Amiker, Clinton Amos Moore, Annie Collins, Alma Moore McGowan, Vashti Clayton, Ella Mae Curry, Wilma Branch, Delois Thompson, and Aaron Moore, Vol. 1 at 1. The Plaintiffs collectively will be referred to hereinafter as "the Moore family." The lawsuit was a Mississippi wrongful death action seeking to impose liability on Keller Industries, Inc., (hereinafter referred to as "Keller") for a collision between a truck owned and operated by Keller and an automobile operated by Amos

Moore on January 15, 1987, id.; see also Vol. 3 at 682-84. Amos Moore died as a result of internal brain bleeding on January 16, 1987, and the Moore family contended that this bleeding was caused by the impact of the collision, id. Federal jurisdiction was premised on diversity of citizenship, 28 U.S.C. Section 1332(a), and a jury trial was requested, id.

The case was originally tried in Meridian, Mississippi, from October 3-5, 1988, Vol. 3 at 594. The jury returned a verdict for the defense, Vol. 3 at 596. The Moore family filed a Motion for Judgment N.O.V. or, in the Alternative, for New Trial, Vol. 3 at 602. The District Court granted a new trial, ruling that it erred by failing to grant a peremptory instruction that the Keller driver was negligent as a matter of law, Vol. 3 at 646.

The case was tried a second time in Meridian, Mississippi, from May 15-17, 1989, Vol. 3 at 706. The Batson issue in the instant case arose at the second trial in May 1989. The Moore family are all Black citizens. Exhibit 2, Vol. 7 at 140. The venire was comprised of seventeen White and eight Black members. Vol. 3 at 725.[1] After voir dire examination, Keller

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[1] The members of the venire were:

1)	Cleavie Arrington	White
2)	Thomas Doherty	White
3)	Frank Rackley	Black
4)	Thomas Roundtree	White
5)	Brenda Poe	White
6)	Mary Jones	White
7)	Johnnie Wright	White
8)	Theresa Fanning	White
9)	Sam Montgomery	White
10)	Virginia Walker	White
11)	Gus Goforth	White
12)	Mildred Bonner	Black
13)	Joe Chambers	White
14)	Janie Moyer	White
15)	Edward Williamson	White
16)	Quinton Pullin	White
17)	Bessie Cheatham	Black
18)	James Jenkins	Black
19)	Lawrence Hosey	Black
20)	Trevelle McGlothlin	Black

requested the Court to strike four Black jurors for cause: Charlie Boose, Vol. 7 at 45-46, Lawrence Hosey, Vol. 7 at 46, Lifley Barlow, Vol. 7 at 46-47, and Bessie Cheatham, Vol. 7 at 47. Keller then exercised its peremptory challenges against Frank Rackley, Theresa Fanning, and Mildred Bonner, Vol. 7 at 48. Mr. Rackley and Mrs. Bonner are Black persons, Vol. 3 at 725.[2] At this point counsel for the Moore family lodged his objection to

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21)	Charlie Boose	Black
22)	Frances Rogers	White
23)	Lifley Barlow	Black
24)	David Laney	White
25)	Byron Alexander	White

[2] Originally, the Moore family considered Theresa Fanning to also be Black, Vol. 7 at 49. However, Keller was of the opinion that Ms. Fanning was White, Vol. 7 at 50, which was in accordance with Ms. Fanning's own responses on her jury questionnaire, Vol. 7 at 107. Obviously, the Batson issue in this case applies only to the exclusion of jurors Rackley and Bonner.

the defense peremptory challenges under Batson. Vol. 7 at 48.

The trial court, noting the panel opinion in Edmonson, 860 F.2d 1308 (5th Cir. 1989) which applied Batson to civil cases, opined that under Batson the defense should be made to account for its use of peremptory challenges.[3] The defense stated that it had three reasons for striking Mr. Rackley; his age (said to be in his 50s), the fact that he had a deceased parent, and the subjective factor of "nonresponsiveness." Vol. 7 at 50. As for Ms. Bonner, the defense stated that

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[3] Inasmuch as the District Court required Keller to explain the reasons for its peremptory challenges, this Court is not called upon to decide if the Moore family sufficiently made a prima facie showing under Batson. Following this Court's decisions in the Title VII context, the Fifth Circuit in criminal cases under Batson reviews only the District Court's finding of discrimination vel non. United States v. Forbes, 816 F.2d 1006, 1010 (5th Cir. 1987).

she had indicated that she had a friend or spouse who had suffered a death from trauma, that her son had been involved in an auto accident, and that she had some medical background. Vol. 7 at 51. As the Court pointed out, Ms. Bonner's later responses were to the effect that her son was a defendant in a suit involving an auto accident, Vol. 7 at 51.

The Plaintiffs made a showing of comparable factors in the jury pool, to show that the criteria alleged by the defense in response to the Batson objection were pretextual. The Plaintiffs pointed out that juror Laney, who was White, was also apparently in his 50s, but was not struck by the defense. Vol. 7 at 52. The Plaintiffs pointed out that there were several other persons who were at least in the 50 age range who were White and not struck. Id. Counsel also pointed

out that five persons, including Mrs. Bonner, had responded affirmatively to the question whether their parents had died, and yet the other four persons were not struck. Id. Finally, the Moore family objected to the use of subjective factors such as "nonresponsiveness." Id.

The Court found that it was "not satisfied that the strikes were exercised because of race. There were legitimate reasons given," Vol. 7 at 53.

At the second trial, the District Court instructed the jury to find Keller Industries to be negligent as a matter of law. The jury returned a verdict for $12,000, Vol. 3 at 715. The Moore family filed a timely Motion for New Trial, asserting that the District Court erred in allowing Keller to exercise peremptory challenges in a racially discriminatory manner, and that the damages awarded were

inadequate as a matter of law and contrary to the great weight of the evidence, Vol. 3 at 719. The District Court overruled the Motion, Vol. 3 at 769.

The Moore family filed a timely Notice of Appeal, Vol. 3 at 770. On appeal, the Moore family raised the peremptory challenge issue in its Original Brief, specifically requesting the Fifth Circuit to review the District Court's determination that the peremptory challenges exercised by Keller were not motivated by race. Keller responded by pointing out that the Fifth Circuit refused to apply the rationale of Batson v. Kentucky, 476 U.S. 79 (1986) to civil cases in Edmonson v. Leesville Concrete Company, Inc., 895 F.2d 218 (5th Cir. 1990) (en banc). In their reply brief, the Moore family recognized that Edmonson foreclosed their jury challenge argument

in the Fifth Circuit, but specifically preserved the argument for purposes of later review. The Fifth Circuit opinion did not address the issue.

REASONS FOR GRANTING THE WRIT

This Court has granted certiorari in Edmonson v. Leesville Concrete Company, Inc, No. 89-7743, ____ U.S. ____, 112 L.Ed.2d 18 (October 1, 1990), to determine the very issue presented in this case: whether racial discrimination in the exercise of peremptory challenges in Federal civil cases violates the United States Constitution. See, e.g., Batson v. Kentucky, 476 U.S. 79 (1986). The Circuit Courts of Appeals are divided on this critical issue. See Dunham v. Frank's Nursery & Crafts, ____ F.2d ____, 1990 WESTLAW 198907 (7th Cir., December 12, 1990) (applying Batson to civil cases

under the Fifth Amendment's equal protection guarantees); Fludd v. Dykes, 863 F.2d 822 (11th Cir. 1989) (same); Reynolds v. City of Little Rock, 893 F.2d 1004 (8th Cir. 1990) (applying Batson to civil cases when a State agent is a party litigant); Dias v. Sky Chiefs, Inc., ____ F.2d ____, 1990 WESTLAW 181147 at n.5 (9th Cir., November 27, 1990) (refusing to extend the Batson rationale).

Because the Fifth Circuit had previously opined that the discriminatory exercise of peremptory challenges does not violate the constitution, Edmonson, 895 F.2d 218 (5th Cir. 1990), it made no attempt to review the District Court's determination in this case that Keller gave non-racial justifications for its peremptory challenges. Certainly, if Batson applies to civil litigants in District Court, the trial court's ruling

in this case should have been reviewed by the Fifth Circuit. Unquestionably, the Petitioners here, all Black citizens, have standing to raise the Batson claim. Indeed, the District Court so found by requiring Keller to provide race-neutral explanations for the peremptory challenges. The standard of review to be applied to a trial court's findings of nondiscrimination is to be elucidated by this Court in another case this term, Hernandez v. New York, No. 89-7645, cert. granted, ____ U.S. ____, 112 L.Ed.2d 201 (October 9, 1990).[4] However, the Court of Appeals clearly must provide some review of the District Court's ruling, Batson,

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[4] The second question on which certiorari was granted in Hernandez is: "[w]here a trial court has accepted the prosecutor's proferred explanation as being race neutral, what standard of review is to be applied by reviewing courts?" Hernandez, 112 L.Ed.2d at 202.

476 U.S. at 98n.21. The Fifth Circuit's failure to do so here mandates reversal, if Batson's prohibition against racially discriminatory peremptory challenges applies to civil litigants in Federal Court.

CONCLUSION

This Court should hold this Petition in abeyance pending the outcome of Edmonson, and should grant the writ in this case, upon the reversal of the Fifth Circuit in Edmonson, or, in the alternative, upon this Court's inability to reach the merits of the Batson issue in Edmonson.

Respectfully Submitted,

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APPENDIX "A": FIFTH CIRCUIT OPINION

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 89-4613

EVERDEAN MOORE, ETC., ET AL.,

Plaintiffs-Appellants
Cross-Appellees,

versus

KELLER INDUSTRIES, INC,
A Florida Corporation,

Defendant-Appellee,
Cross-Appellant.

Appeal from the United States
District Court for the
Southern District of Mississippi
(CA-E87-0018(L))

(October 10, 1990)

Before POLITZ, WILLIAMS, AND SMITH, Circuit Judges.

PER CURIAM:

This matter is before the court on

appeal of the grant of a new trial to the plaintiffs after the first trial of this cause, as well as on appeal of the verdict for plaintiffs following the retrial. After considering the briefs and oral arguments of counsel, in light of the relevant portions of the record of the two trials, and concluding that there was neither error nor abuse of discretion in the grant of the new trial or in any ruling relative to the new trial, and further finding that the jury verdict is supported adequately by the evidence and is consistent with controlling principles of law, the judgment is AFFIRMED in all respects.

APPENDIX "B": EXCERPT FROM BRIEF OF PETITIONERS IN FIFTH CIRCUIT

Beginning at Page Ten:

In Batson v. Kentucky, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), the United States Supreme Court held that the equal protection clause of the Fourteenth Amendment prohibited State action which caused black jurors from being excluded from trial juries by means of peremptory challenges exercised against them due to their race. Although Batson itself was based upon the Fourteenth Amendment, it is clear that the Fifth Amendment prohibits racial discrimination in Federal jury selection, United States v. Leslie, 813 F.2d 658 (5th Cir. 1987).

This Court, in Edmonson v. Leesville Concrete Co., Inc., 860 F.2d 1308 (5th Cir. 1988)(pending en banc consideration),

held that judicial administration and enforcement of peremptory challenges based on race constitutes State action. Therefore the Edmonson Court concluded that the racially discriminatory exercise of peremptory challenges violates Batson, even in a civil action. This Term, a majority of the United States Supreme Court characterized Batson as protecting the rights of jurors not to be excluded from jury service based upon their race, Holland v. Illinois, ___ U.S. ___ (January 22, 1990) (See separate opinions of Kennedy, J., Concurring, and Stevens and Marshall, JJ., Dissenting). The Moore family submits that the rationale of the Edmonson panel opinion is strengthened by this recognition. If the right protected by Batson is held by the juror instead of

a criminal defendant,[1] then all State actors which facilitate and enforce racial discrimination against the juror are susceptible to equal protection analysis. See, e.g., Shelley v. Kraemer, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161 (1949).

Under Edmonson, a prima facie case under Batson is made where one party is a member of a cognizable racial group, and the opposing party exercises peremptory challenges to remove members of that racial group from the venire, Edmonson, supra, 860 F.2d at 1315. Of course, a timely objection based on Batson must be made, Thomas v. Moore, 866 F.2d 803 (5th

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[1] Under this theory, the party protesting the racially discriminatory exclusion of the juror has standing to raise the violation of the juror's rights under the "third party standing" principle set forth in Singleton v. Wulff, 428 U.S. 106, 96 S.Ct. 2868, 49 L.Ed.2d 826 (1972).

Cir. 1989).[2]

The Batson issue in the instant case arose at the second trial in May 1989. The Moore family are all Black citizens. Exhibit 2, Vol. 7 at 140. The venire was comprised of seventeen White and eight Black members. Vol. 3 at 725. . . . After voir dire examination, Keller requested the Court to strike four Black jurors for cause: Charlie Boose, Vol. 7 at 45-46, Lawrence Hosey, Vol. 7 at 46, Lifley Barlow, Vol. 7 at 46-47, and Bessie Cheatham, Vol. 7 at 47. Keller then

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[2] Under Batson, the objection is timely if made before the venire is dismissed and prior to commencement of trial, United States v. Romero-Reyna, 867 F.2d 834 (5th Cir. 1989). But cf. United States v. Cartledge, 808 F.2d 1064 (5th Cir. 1986) (Batson challenge made on Motion for New Trial sufficient in case tried before Batson decision but not yet final at time of Batson). In the instant case, the objection was made immediately after Keller exercised its peremptory challenges, Vol. 7 at 48.

exercised its peremptory challenges against Frank Rackley, Theresa Fanning, and Mildred Bonner, Vol. 7 at 48. Mr. Rackley and Mrs. Bonner are Black persons, Vol. 3 at 725.[3] At this point counsel for the Moore family lodged his objection to the defense peremptory challenges under Batson. Vol. 7 at 48.

The trial court, noting the Edmonson decision, opined that under Batson the defense should be made to account for its use of peremptory challenges.

. . . .

The Plaintiffs made a showing of comparable factors in the jury pool, to

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[3] Originally, the Moore family considered Theresa Fanning to also be Black, Vol. 7 at 49. However, Keller was of the opinion that Ms. Fanning was White, Vol. 7 at 50, which was in accordance with Ms. Fanning's own responses on her jury questionnaire, Vol. 7 at 107. Obviously, the Batson issue in this case applies only to the exclusion of jurors Rackley and Bonner.

show that the criteria alleged by the defense in response to the Batson objection were pretextual.

. . . .

The Court found that it was "not satisfied that the strikes were exercised because of race. There were legitimate reasons given," Vol. 7 at 53.

The Batson Court set forth the basic procedure for evaluating a claim of discriminatory peremptory challenges, with several references to the well settled burden of proof rules in the employment discrimination context. Batson, 476 U.S. at 94n.18, 90 L.Ed.2d at 86n.18 [citing McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 688 (1973) and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)]. Where the objecting party has set out a prima facie

case of discrimination, the party exercising the peremptories must articulate "a neutral explanation related to the particular case to be tried," Batson, 476 U.S. at 98, 90 L.Ed.2d at 88. The objecting party then has the ultimate burden of proof to show discrimination. Of course in the employment discrimination context, under McDonnell Douglas and Burdine the party charging discrimination may offer proof that the articulated neutral reasons are pretextual. See Burns v. Texas City Refining Inc., 890 F.2d 747 (5th Cir. 1989); Burdine, supra, 450 U.S. at 253-56, 101 S.Ct. at 1093-95.

Several State Supreme Courts have taken up the issue of evaluating whether the articulated neutral grounds given for peremptory challenges are pretextual. The Florida Supreme Court recognized in Slappy v. State, 522 So.2d 18 (Fla. 1988), that

without some guidelines for determining pretext, Batson would be a toothless guarantee of racial equity. That Court affirmed the opinion of one of Florida's District Courts of Appeal in setting forth five factors weighing against the legitimacy of the proffered "race-neutral" explanations: 1) the explanation is an alleged group bias not shown to be shared by the juror in question; 2) the party exercising the challenge failed to examine the juror or conducted only a perfunctory examination of the juror; 3) the party exercising the challenge singled the juror out for special questioning designed to evoke a certain response; 4) the proferred explanation for the peremptory strike is unrelated to the facts of the case; and 5) the proferred explanation is equally applicable to jurors not challenged.

Several other State Supreme and

Appellate Courts have implemented similar standards. Ex Parte Branch, 526 So.2d 609 (Ala. 1987); People v. Turner, 726 P.2d 102 (Cal. 1986); State v. Collier, 553 So.2d 815 (La. 1989); State v. Antwine, 743 S.W.2d 51 (Mo. 1987); Keeton v. State, 749 S.W.2d 861 (Tex. Crim. App. 1988); State v. Gilmore, 511 A.2d 1150 (N.J. 1986).

In this case, the District Court insufficiently examined the explanations given by Keller. With regard to juror Rackley, the first stated justification for the peremptory challenge was his age, estimated by Keller to be in his 50s. Vol. 7 at 50. However, it was not disputed that a White juror, Mr. Laney, also appeared to be elderly, and that several other jurors in the 50s age range were seated as jurors. Vol. 7 at 52. Further, counsel for Keller engaged in no

questioning in voir dire as to whether jurors could put aside any similarities of age with Plaintiffs' decedent in deciding the case. Indeed, counsel for Keller asked no questions regarding age to the panel, not even bothering to ask the jurors their ages.

The second stated rationale for the Rackley strike was that he had a deceased parent. Vol. 7 at 50. Although this question on voir dire was asked by the Plaintiffs, Vol. 7 at 32-33, counsel for Keller asked no follow up questions in this vein. It was undisputed that five persons on the venire responded affirmatively to these questions, Vol. 7 at 52, yet only two of these were struck by Keller.[4]

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[4] In this connection, it is noteworthy that the other peremptory challenge used by Keller was exercised on totally subjective grounds only. Vol. 7

The third justification for the Rackley strike was the general, subjective one of "nonresponsiveness." Such subjective, non case-specific rationales are highly disfavored, Collier v. State, 553 So.2d 815 (La. 1989). It may very well have been that few of the questions asked in voir dire applied to Mr. Rackley. Indeed, counsel for Keller himself asked no specific questions of Mr. Rackley. This grounds is not a "clear and reasonably specific" explanation of Keller's peremptory challenge, see United

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at 50. Had Keller been sufficiently concerned about the five venire members whose parents or close friends had died, this totally subjective strike could have been used to excuse one of them. However, Keller struck only the two Black jurors for this reason, demonstrating it to be a pretext. See State v. Butler, 731 S.W.2d 265, 269 (Mo. App. 1987) (peremptories are "highly suspect" if unchallenged White jurors have same characteristics as are used to justify strikes against Black jurors).

States v. Romero-Reyna, 867 F.2d 834, 837 (5th Cir. 1989).

As to juror Rackley, then, Keller's explanations fail when compared to the criteria set forth in Slappy, Branch, Antwine, and other post-Batson cases. The "age" and "deceased parent" justifications are based upon an alleged bias shared by those groupings which was never demonstrated to be held by Mr. Rackley. Keller asked no questions of Mr. Rackley. The grounds of "nonresponsiveness" were vague, subjective, and non case-specific. Finally, the "age" and "deceased parent" criteria were shown to apply equally to White jurors who were not challenged by Keller. Therefore, the District Court erred in finding that the peremptory challenge exercised against Mr. Rackley

was not based on race.[5]

The first reason given by Keller for striking Mrs. Bonner was that she had responded affirmatively to the inquiry regarding a deceased parent or spouse. Vol. 7 at 51. In addition to the comparative facts stated above on this same "criteria" for Mr. Rackley, the Court may note that, while counsel for Keller questioned Mrs. Bonner on some issues, Vol. 7 at 43, he asked her not a single question about this deceased relative. Once again, it is undisputed that five

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[5] The nature of this error may be considered under two separate standards of review. The Moore family contends that the District Court's failure to subject the Keller peremptories to any meaningful "pretext" analysis is an error of law as to which this Court need afford no deference. Alternatively, the District Court's acceptance of the reasons given for the Keller peremptories in the face of the comparative evidence showing those reasons to be pretexts for racial discrimination was clearly erroneous.

jurors responded to the question regarding deceased loved ones, Vol. 7 at 52.

Interestingly, Keller alleged that Mrs. Bonner's "medical knowledge" was one of the grounds for the exercise of a peremptory challenge against her, Vol. 7 at 51. Mrs. Bonner was a nurses' aide, Vol. 7 at 34. By contrast, Virginia Walker, a White juror, Vol. 3 at 725, was an LPN, Vol. 7 at 33, and was seated as a trial juror, Vol. 7 at 48, with no objection or peremptory challenge by Keller. Indeed, Ms. Walker had extensive emergency room experience, Vol. 7 at 33, which would give serious pause to a party genuinely concerned about specialized knowledge in a automobile accident/ wrongful death case. Frances Rogers, a White juror, Vol.3 at 725, was a dietitian in Jasper General Hospital in Bay Springs, Mississippi, Vol. 7 at 33-34, and was

seated as a trial juror, Vol. 7 at 48, with no objection or peremptory challenge by Keller.

Finally, Keller claimed that the fact that Mrs. Bonner's son had an automobile accident was a grounds for peremptory excusal, Vol. 7 at 51. However, as Keller's own questioning indicated, Vol. 7 at 43, and as the Court below noted, Vol. 7 at 51, her son is a defendant in a civil action involving an automobile accident. Any bias Mrs. Bonner would have had from that experience would have inured to Keller's benefit.

Once again, the rationales used by Keller to support the challenge to Mrs. Bonner's being seated as a trial juror fail in the face of scrutiny. No questions were asked Mrs. Bonner to determine whether the alleged bias shared by persons whose parents or loved ones had

deceased in favor of the Moores was actually held by Mrs. Bonner. The use of the "medical knowledge" rationale, which was manifestly pretextual in light of Keller's acceptance of jurors Walker and Rogers, highlights Plaintiffs' claim of discriminatory jury challenges. Finally, the automobile accident rationale, as shown above, demonstrated no threat of bias against Keller. Quite the contrary, if there was any fear of bias, it should have been felt by the Moore family in light of the lawsuit pending against Mrs. Bonner's son. Therefore, the District Court erred in finding that the peremptory challenge exercised against Mrs. Bonner was not based on race.

The allowance by a District Court of a single peremptory challenge exercised on account of race is reversible error. See United States v. Clemons, 343 F.2d 741 (3d

Cir. 1988); United States v. David, 803 F.2d 1567 (11th Cir. 1986). Therefore, should this Court hold that the District Court erred with respect to either Mr. Rackley or Mrs. Bonner, the judgment below should be reversed and the cause remanded to the District Court for new trial.

90-1202

No. E87-0018(L)

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

October Term, 1990

EVERDEAN MOORE, WIFE OF AMOS MOORE, DECEASED, AND BOBBIE AMIKER, JOSEPH MOORE, CLINTON AMOS MOORE, ANNIE M. COLLINS, ALMA McGOWAN, VASHTI CLAYTON, ELLA MAE CURRY, WILMA H. BLANCH, DeLOIS THOMPSON, AND AARON MOORE, CHILDREN OF AMOS MOORE, DECEASED

Petitioners,

vs.

KELLER INDUSTRIES OF ALABAMA,
A Florida Corporation

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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NO. E87-0018(L)

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

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EVERDEAN MOORE, WIFE OF AMOS MOORE, DECEASED, and BOBBIE AMIKER, JOSEPH MOORE, CLINTON AMOS MOORE, ANNIE M. COLLINS, ALMA MCGOWAN, VASHTI CLAYTON, ELLA MAE CURRY, WILMA H. BLANCH, DELOIS THOMPSON, and AARON MOORE, CHILDREN OF AMOS MOORE, DECEASED

Petitioners,

vs.

KELLER INDUSTRIES OF ALABAMA, A FLORIDA CORPORATION

Respondent.

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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I.

REASONS FOR NOT GRANTING THE PETITION FOR WRIT OF CERTIORARI

Contrary to the Petitioners' assertions, should this Petition for Writ of Certiorari be granted, the Court would not be presented with the question of whether the Fifth Amendment, or the Court's decision in ***Batson v. Kentucky***, 476 U.S. 79 (1986), applies in cases between purely civil litigants in federal court. Rather the Court would be presented with the same issue presented on appeal to the Fifth Circuit; whether the district court abused its discretion in overruling the Petitioners' ***Batson*** objections.

The Petitioners argue that the issue presented is identical to that already before the Court in ***Edmondson v. Leesville Concrete Co., Inc.***, No. 89-7743, ____ U.S _____, 112 L.Ed. 2d 18 (October 1, 1990).

Edmondson, however, is easily distinguished. There, the district court denied the plaintiffs' request that the defendant articulate a neutral explanation for its peremptory challenges on the grounds that the *Batson* decision did not apply to civil proceedings. *Edmondson*, 895 F.2d 218, 219 (5th Cir. 1990). Similarly, in *Fludd v. Dykes*, 863 F.2d 822, 824 (11th Cir. 1989) and *Dunham v. Franks Nursery & Crafts, Inc.*, 919 F.2d 1281, 1282 (7th Cir. 1990), the district court and magistrate, refused to require any explanation for the use of the peremptory challenges at issue on the grounds that *Batson* did not apply in civil cases.

Unlike those cases, the district court in this case, following the Fifth Circuit panel decision in *Edmondson*, 860 F.2d 1308 (5th Cir. 1988), applied *Batson*, and ordered Keller to articulate its reasons

for peremptorily challenging the two black jurors.

Even if *Batson* does apply to cases between civil litigants, the constitutional safeguards set forth in *Batson* were afforded to the Petitioners, and Keller ultimately prevailed after two jury trials in district court and an appeal with oral argument to the Fifth Circuit by the Petitioners. The Petitioners actually are requesting the Court not to determine the applicability of certain constitutional safeguards in a civil case, but to conduct a *de novo* review of the district court's ruling on their *Batson* objections. This is manifest from the space they have devoted in their Petition to Keller's reasons for exercising its peremptory challenges. Keller does not intend by its Response to lend any credence whatsoever to the Petitioner's assertion that this case is appropriate for review on Certiorari.

However, the Petitioner's extensive discussion of Keller's peremptory challenges, cast in a light most favorable to Petitioners, mandates a clarifying response. In that regard, the transcript of the relevant portion of the record in the second trial is attached hereto as Appendix "A".

When questioned by the district court, Keller's counsel stated that the first black juror, Mr. Rackley, was struck because of his advanced age which Keller believed might indicate bias in favor of the Petitioners due to the age of the deceased. Appendix "A" at V. In addition, Mr. Rackley had a deceased parent which Keller believed might indicate bias in favor of the Petitioners. *Id.* Finally, Mr. Rackley was struck because on ***voir dire*** he was observed to be "nonresponsive in terms of contemplating questions from both the plaintiffs' and the defendant's counsel".

Id. Contrary to the Petitioners' assertions, Mr. Rackley was not struck merely because he did not respond to the questions. Rather he was struck because it appeared that he did not understand the questions or was not attempting to consider the questions asked on ***voir dire***. A juror's inability or unwillingness to pay attention to questions asked on ***voir dire*** is not a subjective or non case-specific reason for striking a juror.

The second black juror, Mrs. Mildred Bonner, also was struck for a number of reasons. First, she had a parent, friend, or spouse who had apparently suffered death from trauma. *Id.* at VI. That fact indicated to Keller's counsel that she might be biased in favor of the Petitioners because it was their theory that the deceased's death was caused by trauma-induced stroke. Second, Mrs. Bonner indicated that she had some medical

knowledge that may or may not have been advantageous to Keller. *Id.* In that regard, Mrs. Bonner had at one time been a nurses' aide approximately ten years before the date of the trial. The Petitioners correctly note that Virginia Walker, a white licensed practical nurse ("LPN"), and Frances Rogers, a white hospital dietician, were seated as trial jurors.

The Petitioners failed to point out, however, that Ms. Walker was an LPN and had formal medical training. Ms. Walker also worked as an emergency room nurse and was familiar with trauma cases. Finally, and perhaps most significantly, Ms. Walker had worked with Dr. Austin Boggan, the deceased's physician who was an expert medical witness for Keller at trial.

Similarly, Ms. Rogers was a dietician with formal training and as such would not be assumed to have medical knowledge potentially harmful to Keller. In fact she

presumably would have knowledge concerning the health problems of elderly patients suffering from diabetes and high blood pressure, which is consistent with Keller's theory that the deceased's stroke was caused by those preexisting conditions.

Finally, Mrs. Bonner indicated that her son had been involved in an auto accident. Although there was some confusion as to the status of the ensuing litigation, at one point Mrs. Bonner stated that her son may have been injured and had a personal injury claim. *Id.* Rather than take a chance on Mrs. Bonner, Keller used one of its peremptory challenges to remove her from the jury.

Keller used its third peremptory challenge to exclude Theresa Fanning, a white juror. Two black jurors were eventually seated on the trial jury. If Keller intended to remove jurors based upon race it would not have used its remaining

peremptory challenge to exclude a white juror.

After hearing Keller's reasons, the district court, which had an opportunity to observe the jurors and hear their responses on *voir dire*, found that the strikes were not based on race and that the reasons given were legitimate. *Id.* at VIII-IX. The court went even further, however, and stated that "a sufficient articulation of reasons has been given for challenging these three jurors for cause." *Id.* at VII (emphasis added).

The Petitioners erroneously assert that the Fifth Circuit made no attempt to review the district court's ruling that there was no discrimination in Keller's use of its peremptory challenges. The Petitioners assume that the Fifth Circuit applied its *en banc* decision in ***Edmondson*** retroactively and therefore failed to consider their appeal on the ***Batson*** issue.

It is clear from the Fifth Circuit's opinion however, that the district court's *Batson* ruling was reviewed on appeal.

In pertinent part, the Fifth Circuit's opinion, attached as Appendix "A" to the Petition for Writ of Certiorari, states:

> After considering the briefs and oral arguments of counsel, in light of the relevant portions of the record of the two trials, and concluding that there was neither error nor abuse of discretion in the grant of the new trial or in any ruling relative to the new trial, and further finds that the jury verdict is supported adequately by the evidence....

Appendix A, Petition for Writ of Certiorari at II (emphasis added).

There were three issues presented on appeal to the Fifth Circuit. Keller's cross-appeal presented the question of whether the district court erred in granting the new trial following the first trial of the case. The Petitioners' appeal presented two issues: whether the district

court erred in overruling their ***Batson*** objection and whether the jury's verdict was against the great weight of the evidence. All three issues were addressed in the Fifth Circuit's opinion. The Fifth Circuit stated that there was "neither error nor abuse of discretion in [1] the grant of the new trial or [2] in any ruling relative to the new trial, and ... [3] that the jury verdict is supported adequately by the evidence." *Id.* Though not expressly stated, it is implicit from the structure and language of the opinion that "any ruling relative to the new trial" refers to the only remaining issue i.e. the ***Batson*** issue.

The Petitioners are dissatisfied with the result as they were following the defense verdict in the first trial and the $12,000 verdict in the second, and merely seek to review a decision of the Court of Appeals with which they likewise do not

agree. The Petitioners' main thrust is to complain about the brevity of the Fifth Circuit's opinion which they assume indicates no review of the district court's *Batson* ruling. It should be noted, however, that "[t]here is no requirement in law that a federal appellate court's decision be accompanied by a written opinion." *Furman v. United States*, 720 F.2d 263 (2nd Cir. 1983); nor is a federal appellate court compelled to spell out each and every issue reviewed and each and every reason for the court's decision. The Petitioners' complaints are fact specific and do not raise any issues of constitutional significance. They simply do not deserve certiorari review.

The Rules of the Supreme Court of the United States indicate the types of cases appropriate for review on writ of certiorari. Rule 10.1, *Rules of the Supreme Court of the United States*, provides that "[A] petition for a writ of

certiorari will be granted only when there are special and important reasons therefor." In the instant case the Fifth Circuit made no decision "in conflict with the decision of another United States court of [appeal] on the same matter." Rule 10.1(a), ***Rules of the Supreme Court of the United States***. Nor has the Fifth Circuit "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision." *Id.* The decision of the Fifth Circuit herein does not fall within this language.

The Petitioners in the instant case are not asking this Court to consider the question of whether **Batson** applies to civil litigants exercising peremptory challenges in federal district court.

Unlike the lower courts in ***Edmondson, Dunham*** and ***Fludd***, the district court in this case applied ***Batson***; requested Keller

to state its reasons for its strikes and not only found that the reasons were legitimate and not discriminatory but that the reasons were sufficient to challenge the jurors for cause.

Therefore the Petitioners are actually requesting this Court to conduct a ***de novo*** review of the district court's factual findings with respect to Keller's reasons for exercising its peremptory challenges. The Fifth Circuit has already reviewed the district court's findings and a ***de novo*** review by this Court would not be appropriate on certiorari.

Even if this Court eventually holds that ***Batson*** applies in purely civil cases, the final result of that decision will be the same as that obtained in this case; the reasons for the strikes and the ruling of the district court will be reviewed by the Court of Appeals for error or abuse of discretion. That is precisely what occurred in the instant case.

CONCLUSION

In short, the district court applied *Batson*, and found no discriminatory motive. The Fifth Circuit reviewed the ruling of the district court for error or abuse of discretion and found neither. Therefore, there are no constitutional questions at issue and this Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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APPENDIX "A": TRIAL TRANSCRIPT EXCERPT

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF MISSISSIPPI
EASTERN DIVISION

EVERDEAN MOORE, WIFE OF
AMOS MOORE, DECEASED, ET AL. PLAINTIFFS

VS. CIVIL ACTION NO. E87-00018(L)

KELLER INDUSTRIES OF ALABAMA,
A Florida Corporation DEFENDANT

TRANSCRIPT OF TRIAL

VOLUME I

Trial held on May 15, 16 and 17, 1989, in Meridian, Mississippi, before the Honorable Tom S. Lee, United States District Judge, and a jury.

APPEARANCES:

For the Plaintiffs:

Mr. James Craig
Ms. Suzanne Ainsworth

For the Defendant:

Mr. John Holloman
Mr. Chris Hoyme

CAROL R. WINSTEAD
Official Court Reporter
245 E. Capitol, Room 518
Jackson, Mississippi 39201
Telephone: (601) 965-4410

MR. CRAIG: Yes, sir. Plaintiffs' peremptory challenge number one would be juror number two, Thomas Doherty. Plaintiffs' peremptory number two would be number seven, Johnnie Wright; and number three would be number 14, Janie Moyer.

THE COURT: The panel is submitted now through number 20, Trevelle R. McGlothin.

MR. HOYME: Your Honor, we would move to strike number three, Mr. Rackley. We would then move to strike number eight, Mrs. Fanning, and then move to strike number 12, Mrs. Bonner.

THE COURT: All right, then. After the exercising of challenges the jury will consist of #4, Thomas S. Roundtree; #5, Brenda Kay Poe; #6, Mary E. Jones; #10, Virginia Walker; #11, Gus Goforth, Jr.; #13, Joe O. Chambers; #15, Edward M. Williamson; #18, James Jenkins; #20, Trevelle R. McGlothin; #22, Frances Rogers; #24, David H. Laney; and #25, Byron Craig Alexander.

MR. CRAIG: Judge, for the record, there's a case--I'm not sure you're familiar with it-- Batson v. Kentucky-- which has to deal with use

of peremptory challenges to strike all black persons. To my knowledge it has not been extended to civil cases, but I had a case on appeal where the Mississippi Supreme Court refused to apply Batson because it was not raised at this stage. I note for the record that all three of the persons struck by Chris by the peremptory challenges were black; and I think under Batson, were it to apply to a civil case, that he would be required to state nonracial reasons for his peremptory challenges.

THE COURT: I don't know the case, but there is a decision by a panel in the Fifth Circuit that has extended Batson to civil cases. I think that case has either gone en banc or is in the process of maybe that occurring.

MR. CRAIG: Well, then we raise it as a serious issue, Judge. I think he has done that.

MR. HOYME: I note for the record that Jim has struck only white jurors. I would ask that if the burden is placed on us to explain our

strikes here, that the burden also be placed on him to explain his. It's my understanding of the law that at this point Batson and that other case have not been formally applied to civil cases, and it's our position that it should not be; but for the record, we have not moved to strike any of these jurors simply on race.

MR. CRAIG: I'm prepared to make a response if the court wants me to.

THE COURT: There is a case that was decided within the last three or four months by the Fifth Circuit in a panel which, I think, included Judge Rubin, where the Fifth Circuit specifically applied the Batson rule to civil cases. I think that case is-- I'm not sure of this, but I believe that it's before the Fifth Circuit for en banc consideration. Taking that into consideration, the court will call on the defendant to explain the three challenges-- your peremptory challenges. And it may develop that that case is not the law, but as of now it is unless the en banc court overturns it.

MR. HOYME: Your Honor, among the criteria used by the defendant to strike juror three, Mr. Rackley, first, his age. He's fairly elderly, in his 50's, which we felt may prejudice him towards the plaintiff due to the age of the deceased. He also has or noted a deceased parent, which we felt would bias him somewhat towards the plaintiff. I also noticed him to be fairly nonresponsive in terms of contemplating questions from both the plaintiffs' and the defendant's counsel during voir dire. It's for those primary reasons that we moved to strike him.

The next juror stricken by the plaintiffs was Mrs. Fanning. She is juror number eight. To be honest, Your Honor, in looking at her, I'm not sure, for the record, whether she's black or white or whatever. I don't know. She is very light-complected; and Carol, right here, thought she was white. I'm not sure; and obviously, based on that observation, we didn't use race as a criteria to strike her. I found her to be very nonresponsive in terms of

contemplating questions by both plaintiffs' and defendant's counsel as well.

Finally, Your Honor, Mrs. Bonner, number 12, who's black. She had a number of responses regarding questions from Your Honor and Jim Craig. Apparently she had a parent-- a friend or a spouse who had suffered a death from trauma, which immediately raised a red flag for defense counsel which we think would prejudice her in plaintiffs' favor. She also appears to have some medical knowledge that may or may not be advantageous to the defendant, and I'm still not sure what the situation is with her son regarding the auto accident. I don't think it was clear; and because it wasn't clear, I didn't want to take a chance on her, and I thought there was a good possibility that she could be prejudiced in favor of the plaintiffs. And it's for those reasons that we moved to strike these people, and not in any manner did we move to strike these people based on race.

THE COURT: With reference to Mildred Bonner, I thought the first time that she said her son was injured and had a personal injury

claim. The second time it seemed that either he is being sued-- or what she referred to as her insurance policy and company is being sued, and I'm not sure either whether he was injured and, if so, whether he has a claim. But I make that observation.

MR. HOYME: The reason I didn't follow it up more specifically is that she started mentioning insurance a lot, and I just thought we should shut it down and go on. I still don't understand what the situation is with her son.

THE COURT: The court is of the opinion that a sufficient articulation of reasons has been given for challenging these three jurors for cause.

MR. CRAIG: Judge, may I make this brief statement in rebuttal? I realized Your Honor has ruled, but I also-- in the Batson case I have had before, they also faulted the moving party for not rebutting the justifications.

THE COURT: All right. Go ahead.

MR. CRAIG: That would simply be three things. One is that in the Batson line of

cases where there is an articulated justification, that applies equally well to white persons who are not struck. That's a rebuttal issue. And though Mr. Lackey is 50 o so years of age, Mr. Laney also appears to be elderly. There are several other persons who are at least in the 50 age range who are white and not struck. Five jurors responded to the question whether their parents had died, and s we feel that that was not a sufficient justification to base a strike on. And third, on the issue of jurors being nonresponsive, we think that's a red herring in that a juror being nonresponsive may just mean that none of the questions apply to them. That's not a sufficient justification for a peremptory challenge under Batson.

THE COURT: Well, there is a right to exercise peremptory challenges; and if the present case before the Fifth Circuit is applicable, that right is subject to the condition that the challenge not be made on account of race. The court is not satisfied

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that the strikes were exercised because of race. There were legitimate reasons given.

The court has received a response to the plaintiffs' motion in limine. The court has not received the motion in the limine itself.

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CERTIFICATE OF SERVICE

I hereby certify that I have this day mailed by United States mail, postage prepaid, a true and correct copy of the above and foregoing Brief in Opposition to Petition for Writ of Certiorari to James W. Craig, Esq., 123 E. Griffith Street, Jackson, Mississippi 39201; and Issac K. Byrd, Jr., Esq., Byrd & Associates, Post Office Box 19, Jackson, Mississippi 39205.

This the 11 day of April, 1991.

William N. Reed

William N. Reed

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